



United States of America
In the
Supreme Court of the United States

No.....

UNITED STATES OF AMERICA
ex rel. LOUIS JACOBS,
Petitioner,
vs.
JOHN J. BARC, United States Marshal for the
Eastern District of Michigan,
Respondent

BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI



INDEX TO BRIEF

| | Page |
|---|-------|
| Opinion Below | 17 |
| Concise Jurisdictional Statement..... | 17-18 |
| Concise Statement of the Case..... | 19-20 |
| Specification of Error to be urged..... | 20 |
| Argument | 20-26 |
| (a) Summary | 20-21 |
| (b) Final Argument | 21-26 |
| Relief Sought | 27 |

CITATIONS

| | |
|---|----|
| Anderson v. Anderson, 76 Fed. (2d) 375..... | 24 |
| Clark v. Suprenant, 94 Fed. (2d) 969..... | 24 |
| Douglas v. King, 110 Fed. (2d) 911..... | 24 |
| Fox v. Ohio, 5 How. 410, 12 L. ed. 213..... | 26 |
| Howard v. U. S., 75 Fed. 986..... | 24 |
| Zerbst v. Kidwell, 304 U. S. 359, 82 L. ed. 1399, 58 S. Ct. 872, 116 A. L. R. 808..... | 25 |

STATUTES AND CONSTITUTION

Federal Criminal Code:

- (a) Act of June 21, 1902, 32 Stat. 397 (18 U. S.
 C., Sec. 710).....18, 19, 20, 21, 22, 23
- (b) Act of June 25, 1910, 36 Stat. 821 (18 U. S.
 C., Sec. 723)..... 18, 22
- (c) Act of May 13, 1930, 46 Stat. 272; March 2,
 1931, 46 Stat. 1469 (18 U. S. C., 716)..... 18, 21
- (d) Act of May 27, 1930, 46 Stat. 392 (18 U. S.
 C., Sec. 744h).....18, 19, 20, 21, 22, 23

| | Page |
|--|------------------------|
| (e) Act of June 29, 1932, 47 Stat. 381 (18 U. S. C., Sec. 710a)..... | 18, 20, 23, 26 |
| (f) Act of June 29, 1932, 47 Stat. 381 (18 U. S. C., Sec. 716a)..... | 18, 21, 22, 23, 26 |
| (g) Act of June 29, 1932, 47 Stat. 381 (18 U. S. C., Sec. 716b)..... | 18, 20, 21, 22, 23, 26 |
| (h) Act of June 25, 1910, 36 Stat. 819 (18 U. S. C., Sec. 714)..... | 18, 21, 22, 24, 26 |

Federal Judicial Code:

| | |
|--|--------|
| (a) Act of March 3, 1891, 26 Stat. 828, Amended June 7, 1934, 48 Stat. 926 (28 U. S. C., Sec. 347a) | 17, 18 |
| (b) Act of February 13, 1925, 43 Stat. 940, amended June 7, 1934, 48 Stat. 926 (28 U. S. C., Sec. 463(a) and (c))..... | 17, 18 |

| | |
|--|----------------|
| United States Constitution, Fifth Amendment..... | 18, 19, 20, 26 |
|--|----------------|

Supreme Court Rules:

| | |
|---|-------|
| Rules XI and XIII Criminal Appeals Rules promulgated May 7, 1934..... | 17-18 |
|---|-------|

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 30) is not yet reported.

CONCISE JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction of this case because of 28 U. S. C. Section 347 (a) and 28 U. S. C. Section 463 (a) and (c) and also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on

May 7, 1934. An interpretation of 18 U. S. C. Sections 710, 710a, 744h, 714, 716, 716a, 716b and 723, which are set out verbatim in the Petition filed herewith, is involved in this case as well as the due process clause of the Fifth Amendment to the Constitution of the United States.

This is a *habeas corpus* proceeding upon behalf of the petitioner herein directed against the United States Board of Parole, an agency of the United States, which seeks to deprive the petitioner of his liberty without due process of law contrary to said Fifth Amendment and contrary to the foregoing statutes, and as such is appealable to the Supreme Court from the Circuit Court of Appeals under 28 U. S. C. Section 463 (a) and (c) which sets forth as follows:

“REVIEW—(a) BY CIRCUIT COURT OF APPEALS: JURISDICTION OF CIRCUIT JUDGE TO ISSUE WRIT. In a proceeding in *habeas corpus* in a district court, or before a district judge or a circuit judge, the final order shall be subject to review, on appeal, by the circuit court of appeals of the circuit wherein the proceeding is had.

• • • • •

“(c) SECTIONS 346 and 347 OF THIS TITLE APPLICABLE. Sections 346 and 347 of this title shall apply to *habeas corpus* cases in the circuit courts of appeals and in the United States Court of Appeals for the District of Columbia as to other cases therein.”

and which said Sections allow certiorari to this Court under 28 U. S. C. Section 347 (a). Therefore, it is respectfully submitted by petitioner that the Supreme Court has jurisdiction of this case upon petition for writ of certiorari, and because of the importance of the question to the Government should be reviewed by this honorable court.

CONCISE STATEMENT OF THE CASE

Petitioner was originally sentenced by the United States District Court for the Eastern District of Michigan to a term of 6 years on November 9, 1933, and by virtue of Title 18 U. S. C. Sections 710 and 744h was released from the penitentiary on November 2, 1937 under a conditional release (R. 10). On July 8, 1939, petitioner was arrested for robbery armed in Detroit, Michigan, was acquitted thereof, was rearrested under the same set of facts January 3, 1940, for carrying concealed weapons and was convicted and sentenced therefor on April 2, 1940, to a term of $2\frac{1}{2}$ to 4 years in the state penitentiary at Jackson, Michigan. On June 3, 1943 petitioner was released from said penitentiary and was taken into custody by the United States Marshal for the Eastern District of Michigan upon a parole violation warrant of the United States Board of Parole (R. 22-23) executed November 7, 1939, and delivered to the United States Marshal November 13, 1939 (R. 23).

On June 4, 1943 petitioner filed a petition in the United States District Court for a writ of *habeas corpus* (R. 1, 23) claiming his arrest under the Parole Violation Warrant (R. 22) was illegal and unconstitutional in violation of the rights guaranteed to him by the Fifth Amendment to the Constitution (R. 3), and claiming that his sentence expired forever on November 2, 1937 and not on November 8, 1939 as contended by the government (R. 23). A writ of habeas corpus was granted on June 4, 1943 (R. 5) and dismissed on July 1, 1943 (R. 17) after the District Court entered its opinion on June 25, 1943 (R. 13-17). An appeal was taken to the Circuit Court of Appeals for the Sixth Circuit and it erroneously affirmed the decision of the lower court (R. 29-33).

It is respectfully submitted that the federal statutes involved herein are set out verbatim in the petition for the writ of certiorari, *supra*, and as they are lengthy will not be repeated in the brief. Bluntly stated this honorable court has to determine whether Sections 716a and 716b Title 18 U. S. C. overrule the plain meaning of Sections 710, 710a and 744h, Title 18, U. S. C., which provide for an absolute deduction from the term of petitioner's sentence, so as to give the Parole Board jurisdiction over petitioner until November 8, 1939, or only until November 2, 1937, as claimed by petitioner (R. 3).

SPECIFICATION OF ERROR TO BE URGED

1. That the circuit court of appeals for the Sixth Circuit erred in holding that the petitioner having been released under the provisions of Section 710 and 744h, Title 18 U. S. C. is under the provisions of Sections 716a and 716b, Title 18 U. S. C. and consequently invalidating the plain meaning of Sections 710 and 744h in violation of the due process clause of the Fifth Amendment.

ARGUMENT

(a) Summary

If the sentence of the petitioner expired November 2, 1937, as contended herein, the Certificate of Conditional Release issued against him is null and void and of no force and effect whatsoever against his rights and liberty, and the warrant issued by the Parole Board on November 7, 1939, is void and of no force and effect against the liberty of petitioner. There is no federal statute authorizing the Certificate of Conditional Release; it is just another device originated without congressional authority therefor by a federal bureau that again whittles

away the liberties of the people and especially this petitioner. *The paramount principle to keep in mind here is that there is no ascertainable statutory authority for the device.*

No doubt the United States and the United States Board of Parole have the power under proper statutes and other proper conditions to release a man under parole for a certain definite time, but where, as here, a man has served his maximum sentence, less his mandatory statutory good time, the statutes of the United States do not provide for any parole or any Conditional Release and therefore, the appellant must be discharged on his petition for a Writ of *Habeas Corpus*.

The parole statutes (Title 18, Sections 714, 716, 716a and 716b) upon which the government relies to retake the petitioner refer to cases and paroles wherein the prisoner is released from prison after serving one-third of the sentence, and as the petitioner was not released under any of the foregoing statutes, but under Title 18 Sections 710 and 744h, the United States Board of Parole does not have any authority whatsoever to retake the petitioner, and this honorable court should so declare. There is no opinion or decision of the Supreme Court of the United States upon this question, and because of the importance of the question to the petitioner, and the importance of the question in the administration of the Federal Parole Act the petition for a writ of certiorari filed herewith should be granted.

(b) Final Argument

Title 18 Section 714 sets forth that a prisoner is eligible for parole after serving one-third of his sentence, and Section 716 thereof sets forth the method of carrying out

Section 714. Section 715 has been superseded by Section 723a and 723b of Title 18, so does not intervene between Sections 714 and 716. *Section 716a and 716b enacted on June 29, 1932* apply to prisoners who make a parole after serving one-third of their sentences, in accordance with Section 714, *supra*. The above sections must be read together. The historical note to Section 714 sets forth as follows: "This Section and Section 715 through to 723 of this Title were an Act entitled, 'AN ACT TO PAROLE UNITED STATES PRISONERS, AND FOR OTHER PURPOSES AND KNOWN AS THE PAROLE ACT.'" There is an absolute division between the immediately foregoing statutes, and Title 18 Section 710 and Section 744h.

As a matter of fact and admittedly the petitioner was released under and by virtue of Title 18 Sections 710 and 744h. Now in reference to Section 710 it is plain that the statute provides for an absolute deduction from the term of the sentence. In part the statute says:

" * * * Shall be entitled to a deduction from the term of his sentence to be estimated as follows * * * ",

and Section 744h reiterates the same command in the following language:

" * * * Sections 710 to 712, inclusive, of this title, providing for commutation of sentences of United States prisoners for good conduct, shall be applicable to prisoners engaged in any industry * * *; and in addition thereto each prisoner, without regard to length of sentence, may, in the discretion of the Attorney General, be allowed, under the same terms and conditions as provided in sections 710 to 712, a deduction from his sentence of not to exceed three days for each month of actual employment in said industry * * * " (May 27, 1930, c. 340, § 8, 46 Stat. 392).

Accordingly under Section 710 petitioner was entitled to a deduction from the term of his sentence of eight (8) days per month, and therefore, petitioner has deducted from his sentence 576 days of statutory good time. Petitioner also earned by especially good conduct and hard laborious industry 160 days under Section 744h, and thereby had his sentence shortened so that he was released November 2, 1937 (R. 10). The United States Board of Parole cannot emasculate the full force and effect of Sections 710 and 744h without doing violent injustice to the rights of the prisoner and petitioner herein, as well as to the plain meaning of the English language. The statutes use plain language and they repeatedly use the words "deduction" and "commutation" and "from the term of the sentence."

The Government relies primarily upon Section 716b of Title 18, because it was enacted after Sections 710 and 744h, for authority to retake petitioner. The Government argues because it was enacted after the immediately foregoing statutes *that it is the law*. That would be an apparently conducive argument, and it apparently appealed to the Circuit Court of Appeals (R. 30), were it not for the fact of the enactment of Section 710a of Title 18 upon the same day as the enactment of 716b Title 18. Section 710a says:

"SAME; PRISONERS SENTENCED ON OR AFTER JULY 29, 1932. With respect to Federal prisoners sentenced on and after July 29, 1932, deductions from the term of sentence for good conduct, as provided for by Section 710 of this title, shall be computed beginning with the day on which the sentence commences to run"

Now, obviously, Section 710a enacted the same day as Section 716b does not bolster the argument of the government, because the said statute refers to Section 710 directly and

uses the same language that the "deductions from the term of sentence for good conduct, * * * shall be computed beginning with the day on which the sentence commence to run." The same principle of law is set forth in Section 723 Title 18, which refers directly to Sections 714 to 722, as follows:

"POWER OF PRESIDENT TO GRANT PARDON OR COMMUTATION, OR GOOD TIME ALLOWANCE NOT IMPAIRED. Nothing in Sections 714 to 722 of this title shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case, or in any way impair or revoke such good time allowance as is or may hereafter be provided by law. (June 25, 1910, c. 387 10, 36 Stat. 821.)"

It is very plain from the foregoing statute that the parole laws from Section 714 through 723 Title 18 are very different from the laws (Sections 710, 710a, and 744h) regarding a reduction from the terms of the sentences, and that they have always been so construed to date heretofore, and that is the main point petitioner is attempting to make herein, viz, that petitioner does not fall within the parole laws.

Good time is mandatory and must be granted. *Clark v. Suprenant*, 94 Fed. (2d) 969; *Douglas v. King*, 110 Fed. (2d) 911; *Howard v. U. S.*, 75 Fed. 986; and *Anderson v. Anderson*, 76 Fed. (2d) 375. See *Clark v. Suprenant*, *supra*, to the effect that the Parole Board does not regard a prisoner on a conditional release as a parolee. Petitioner was arrested by virtue of a Parole Violation Warrant and he is admittedly released according to the Parole Board under a Conditional Release (R. 10) (R. 22). In addition thereto the Board executed its Parole Violation Warrant on November 7, 1939 (the Government claims said date

is one day before the expiration of the sentence), and did not turn the said Warrant over to the Marshal until November 13, 1939, which was after the termination of the sentence, and the whole course of conduct of the Parole Board is so inconsistent, and so illegal, and so unconstitutional that the Supreme Court should not hesitate to announce the fact to the world.

Zerbst v. Kidwell, 304 U. S. 359, 82 L. ed. 1399, 58 S. Ct. 872, 116 A.L.R. 808 does not decide the issue in this case. The precise question raised herein was not the issue in said case, and the question herein was not involved in the decision of the case. The Court in deciding the question therein gratuitously assumed that all of the prisoners were on parole; there would be no argument in the instant case if petitioner were on parole when he left the penitentiary. Admittedly he was not. The footnote number 1 in the *Zerbst v. Kidwell*, case, *supra*, gratuitously assumes that all prisoners released with credit for good behavior, as petitioner herein, is on parole. We respectfully submit that assumption was made for the purpose of decision in the *Zerbst* case, *supra*, and certainly should not be made binding upon petitioner herein when apparently the question was not raised in the *Zerbst* case and thereby was not properly considered. We are not quarreling with the main tenet in the *Zerbst* case and we are willing to abide by a decision of the Supreme Court when the main question is presented and decided by it, but we respectfully submit that a footnote should not make the law when a man's liberty is at stake upon a sentence now eleven years old, nor should it be the law in any respect.

Finally, the petitioner has served his full sentence provided by law. The United States Board of Parole has no authority over him whatsoever. If the Congress decided otherwise, it has not said so in plain understandable language and this Honorable Court should not say so in

violation of the Fifth Amendment to the Constitution of the United States. Petitioner has served his entire sentence which has been automatically reduced forever on November 2, 1937, by the sections of the law in such case made and provided, to-wit: Section 710 and 744h of Title 18 U.S.C. The petitioner is entitled to a discharge upon his application for a Writ of Habeas Corpus, and this Court should so order after granting this petition for a writ of certiorari.

The petitioner not having made a parole upon termination of one third of his sentence is not under the provisions of the parole laws in such case made and provided, to-wit: Sections 714, 716, 716a and 716b of Title 18 U.S.C. Petitioner has not been under any parole since his discharge from the United States Industrial Camp, November 2, 1937. The petitioner earned every day of his good time by his excellent behavior and industry while in prison. Petitioner should not be required to reserve time that he has earned by good behavior and hard work. The United States Board of Parole denied him a parole after serving one-third of his sentence, and accordingly should be denied its alleged right to retake him after making the petitioner serve his full sentence less his mandatory good time. The United States should not be an Indian giver and should be fair.

There is a conflict of decision between the circuit courts in this matter, there is a grave question of importance in the administration of the federal good conduct and parole act to be decided here, for the government as well as for the petitioner, and the Fifth Amendment is involved as a restriction upon the power of the Federal Government. *Fox v. Ohio*, 5 How. 410, 12 L. Ed. 213.

RELIEF SOUGHT

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit should be granted.

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Dated: April 17, 1944.